

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 11 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : YES
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

BHARATKUMAR @ BHOPO KALIDAS

Versus

STATE OF GUJARAT

Appearance:

MS SADHANA SAGAR for Appellant
MR HM PRACHHAK, APP for Respondent

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 29/03/2004

1. Appellant - accused Bharat @ Bhopo Kalidas has challenged in this Appeal the impugned judgment and order of conviction and sentence dated 16.12.96 passed by the learned Additional Sessions Judge, Banaskantha at Palanpur, in Session Case No. 54 of 1995.

2. It is the prosecution case that on 11.12.94, at 10.30 a.m. near staircase of Vir Vijay Flats at Deesa, accused - appellant Bharat @ Bhopo Kalidas, gave threat to deceased Mahesh and other witnesses to kill and committed murder of deceased Mahesh by giving knife blows and thereby committed offences punishable under Sections 504, 506(2), 302 of the IPC and also under Section 135 of the Bombay Police Act. The learned Additional Sessions Judge found the appellant - accused guilty for the offence under Sections 302 IPC and sentenced to suffer life imprisonment and to pay fine of Rs.200/-, in default to further undergo one year rigorous imprisonment. He has also convicted the appellant - accused for the offence under Section 506(2) of the IPC and sentenced to suffer one year rigorous imprisonment. He has also convicted the accused - appellant for the offence under Section 135 of the Bombay Police Act and sentenced to suffer rigorous imprisonment for four months and fine of Rs.100/- and in default to undergo simple imprisonment of one month. All the substantive sentences were ordered to run concurrently. The impugned judgment and order of conviction and sentence dated 16.12.96 passed by the learned Additional Sessions Judge is challenged by the appellant - accused by way of this Appeal filed through jail. He has prayed for free legal aid, therefore, Ms. Sadana Sagar is appointed to defend his case in this Appeal.

4. Dharmendra V. Khatri, PW-3 Exh.14, lodged an FIR on 11.12.94 at 12.00 noon before the Police in Government Hospital about the incident in question. He is brother of deceased Mahesh. He has stated in his FIR Exh.41 that on 11.12.94 at about 9.00 a.m. he opened his Video Cassette Shop. At that time, his servants, namely, Atul Natverlal Thakkar, PW-7 Exh. 28 and Dilipkumar Kantilal, PW-4 Exh.16 also came. He told this brother deceased Mahesh to go to Vir Vijay Flats where there was a fault and come back after repairing the same. Thereupon, at about 10'0 clock in the morning, all the three i.e. his brother Mahesh and his two servants Atul Natverlal and Dilipkumar Kantilal had left. Within one hour i.e. at 10.30 a.m. his servant Atul came to him and told him that accused Bharatkumar @ Bhopo Kalidas had given knife

blows on the chest and waist of Mahesh, who was lying on the ground floor near the staircase of Vir Vijay Flats. Dilip was with him (Mahesh). Atul also told him that when they had gone for repairing of disc connection, accused Bharat @ Bhopo Kalidas, was cutting wires, therefore, Mahesh asked him why he was cutting wires? Thereupon, the accused Bharatkukar gave abuses to Mahesh and told him that he will not allow him to go alive, and by giving threatening, he took out knife from his pocket and gave blows to Mahesh on his chest and waist. Thereupon, he (complainant) immediately went to Vir Vijay Flats. There he came to know that his brother was removed to the hospital, therefore, he immediately reached to the hospital, where he found his brother dead. This is the sum and substance of the complaint lodged by complainant Dharmendra Khatri in his FIR at Exh. 41.

Before the Court, he has narrated the same story in his evidence-in-chief. In his cross-examination, he has stated that he came to know fault in Vir Vijay Flats on Saturday evening. Ganapatji Kapurji Mali informed about the fault. There are about 15 families are staying in the said Vir Vijay Flats. Out of which, 10 families are having disc connection. Bharat - accused is also staying in Vir Vijay Flats. Except Ganapatji, nobody else made complaint about the fault. He had not seen the incident. For fault repairing, Atul, Dilip and Mahesh had gone there. Out of three, only Dilip and Atul had knowledge of repairing, but Mahesh had no knowledge. He had only gone for their help. For fault repairing, no instrument was needed.

5. Atulkumar Natvarlal, PW-7 Exh. 28, stated in his evidence that incident in question took place at about 10.30 a.m. Dharmendra Khatri (PW-3) had asked them to go to Vir Vijay Flats for repairing the fault in disc connection of Vir Vijay Flats, therefore, he had gone to the terrace of Vir Vijay Flats along with Dilip and Mahesh (deceased). They saw wires of disc connections were cut off. For repairing the fault, they were coming down. At that time, Ganpatji Kapurji Mali, PW-6 Exh. 26 met them. Ganpatji Kapurji Mali told them that accused Bharat @ Bhopo Kalidas is cutting the wires of disc connection. Thereafter, when all three of them and Ganpatji were coming down. At that time, accused met them near the staircase on the ground floor. Deceased Mahesh asked him why he is cutting wires of disc connection. Thereupon, accused got excited and started abusing and threatening that he will not allow him to go alive and by threatening so, he took out a knife from his pocket and gave three blows with knife on his chest,

stomach and waist. Maheshbhai fell down. Dilip caught hold of him and laid him down. Blood was coming out from Mahesh, therefore, he had immediately gone to the shop to call Dharmendra and informed him about the incident. Dharmendra asked him to stay at the shop and then he had gone to Vir Vijay Flats. Thereafter, he came to know that Maheshbhai died in the hospital. He had taken the Police to the scene of offence.

In his cross-examination, he has stated that when the incident in question had taken place, nobody else had come out from the flat and he immediately went to the shop. He had denied the suggestion that he, Dilip and Mahesh caught hold of the accused and started beating him by saying that why he was cutting wires. According to him, deceased Mahesh had asked accused, why he was cutting the wires? He has denied the suggestion that, thereafter, quarrel took place and all of them started beating the accused, and at that time, Mahesh received injuries. He had also denied the suggestion that knife was in the hands of Mahesh for cutting wires. He had also denied the suggestion that because he was serving at the shop of Dharmendra, he was falsely deposing.

5. Dilipkumar Kantilal, PW-4 Exh.16 is another servant of complainant Dharmendra. He has stated in his evidence-in-chief before the court that in the evening of 10.12.94 they received a complaint for fault in disc connection at Vir Vijay Flats. Thereupon, on 11.12.94 at about 10.15 a.m., he, Atul (PW-7 Exh.28) and deceased Mahesh had gone to Vir Vijay Flats for repairing. They found that wires of disc connection were cut off. After repairing them when they were coming down, at that time, Ganpatji Kapurji Mali (PW-6 Exh. 26) met them and told them that accused - Bharat @ Bhopo Kalidas was cutting wires. When they were coming down, accused met them near the staircase on the ground floor. Mahesh asked him (accused), why he was cutting the wires of disc connection? Thereupon, accused started giving abuses to Mahesh and told him that he will not allow him to go alive and by saying so he took out a knife from his pocket and gave blows on his chest, waist and stomach and then he ran away. Mahesh fell down then and there. Thereafter he had sent Atul (PW-7 Exh.28) to inform Dharmendra. At that time, Ganpatji was with them. When they were running here and there, at that time, one black colour jeep came, in which he, Ganpatji and two others had removed Mahesh to the Hospital. On examination, the Doctor found him dead.

In his cross-examination, he has started that

since last one and half years of the incident he was serving with the complainant. Earlier to the incident, they had gone for fault repairing at Vir Vijay Flats. When they had gone to the terrace along with Ganpatji Kapurji Mali, no one from the flat came with them on the terrace. They saw the ends of wire separated. After taping the wires, they came down for fault repairing. They had gone with the tape only. There are four floors in Vir Vijay Flats. In some floors, people are staying and some were vacant. Ganpatji Kapurji Mali met them on the first floor. Accused also staying in Vir Vijay Flat with his brother on the fourth floor. When Ganaptji Kapurji talked to them on the first floor, at that time, accused was not present. They met the accused on the ground floor near the staircase. They were not knowing from where he was coming. Mahesh (deceased) had asked the accused why he was cutting the wires? He had denied the suggestion that at that time Mahesh gave abuses to the accused, and because of that, altercation took place between them. He had also denied the suggestion that he, Mahesh and Atul had caught hold of the accused for cutting the wires and because of that, scuffle took place. He also denied the suggestion that at that time deceased Mahesh got excited. He has also stated that when accused and Mahesh were talking, at that time, the accused took out a knife and gave three blows to Mahesh and when they had tried to save Mahesh, at that time, accused ran away. He had denied the suggestion that the incident in question had not taken place near the stair case but near the passage at the top. He had also denied the suggestion that for fault repairing only Mahesh had gone.

6. Third and last eye witness is Ganpatji Kapurji Mali, PW-6 Exh.26. He is the resident of Vir Vijay Flats, who had lodged the complaint about fault in the disc connection on the previous evening of the incident. He is only 16 years old. He has stated in his evidence before the Court that he is staying with his family on the first floor of the flat whereas the accused is staying on the fourth floor. When the incident took place, at that item, he was in his flat. Because of fault in their disc connection, Mahesh (deceased) had come to his flat with his two servants Dilipkumar and Atul and gone to the terrace to see the wires. At that item, he was in his room. When he came out from his room, at that time, he saw Mahesh, Atul and Dilip coming down from terrace. At that time, they met him. He told them that accused was cutting wires. When they were coming down, at that time, the accused was standing on the ground floor near the staircase. At that time Mahesh

told the accused why he was cutting the wires? Thereupon, accused got excited and started abusing him and told him that he will not allow him to go alive, and by saying so, he took out a knife from his pocket and gave three blows to Mahesh on his chest, stomach and waist. Mahesh fell down. Blood was coming out. The accused ran away from the place. Thereafter, Atul had gone to call Dharmendra, and Dilip stayed with Mahesh. At that time, one black colour 'Safari' vehicle came, in which they removed Mahesh to the government hospital. Doctor treated him. He was standing out. At that time, he came to know that Mahesh expired. On the previous day evening at about 7.00 p.m. he had informed about fault repairing to Dharmendrabhai and for repairing the fault, they had come on the day of incident in the morning.

In his cross examination, he has stated that there are in all 10 faults in the apartment, in which different families are staying. In the morning, male members would go to their jobs but ladies would be there with their children. Ladies of the flats were present at the time of the incident. Shops on the southern side of the flats were opened in the morning where customers were passing through. There is a public road nearby the flats where the people were passing. He did not know what happened on the terrace as he had not gone there for fault repairing on the terrace. He had seen the accused cutting the wires. He had also seen the accused cutting the wires near his doors. They were afraid of accused therefore they were not telling the accused why he was cutting the wires. Prior to this also, on seven occasions, the accused had cut the wires. At that time also, he had complained of the same to Dharmendra. Prior to the incident, once he had complained about such fault. When he had gone to Dharmendra for complaining about the fault, at that time, he had not stated that the wires were cut off. When they were coming down from the terrace, Mahesh was first, followed by Dilip, Atul and then himself. Accused met them on the ground floor near the staircase. At that time, altercation took place between Mahesh and accused when Mahesh asked the accused, why he was cutting the wires? He has denied the suggestion that Dilip, Atul got angry with the accused. He has also denied the suggestion that Dilip, Atul and Mahesh and he, all four of them, had caught hold of the accused and started beating. He has also denied the suggestion that at that time the accused was frightened. He had seen the accused taking out small knife from his pocket. At that time, he could not apprehend the accused as Mahesh was not in front of him. He has also denied the suggestion that the incident in question had never

taken place near the staircase. He has admitted that Dilip, Atul and he are friends. He had also denied the suggestion that because they were friends of deceased Mahesh, therefore, he was falsely deposed.

7. Police Inspector Sathabhai Laxamnabhai Desai, PW-11 Exh. 40, who investigated the case, has stated in his cross-examination that the injured was brought in a jeep to the Hospital, but they could not find out the jeep during the investigation. Dilip took the deceased in the Hospital from that jeep. How many other persons were there in the jeep also could not come out in the investigation. He has stated that it is false that the deceased was removed to the hospital not from jeep but from black car. According to him, the said jeep was of black colour. He had also denied the suggestion that on the basis of the statements of Dilip, Ganaptji and Natvar, he had made the investigation. He has also denied the suggestion that the incident in question took place somewhere else and the injured was brought at the place of incident. He had also denied the suggestion that he had not recorded the statements of the persons staying in the flats. He had also denied the suggestion that the accused was mentally imbalance.

8. The prosecution has examined one more witness Gordhanji Gigaji, PW-2 Exh. 13, before whom the accused had made a confessional statement. He has stated in his evidence that during the incident, he and Hathibhai Vaghela were talking in his office. At that time, the accused came running at about 11.30 a.m. and told him that he had committed murder of one person and he wanted Rs.200/- for running away to Ahmedabad. He refused, therefore, he had gone towards SCW High School. Thereafter, within two hours, he came to know that Mahesh Khatri was murdered at Vir Vijay Flats. Police took his statement.

In his cross-examination, he stated that he was knowing the accused just two months of the incident. He is a sitting MLA of BJP. For contesting the election of Nagarpalika, the accused used to meet him for getting ticket, therefore, he was knowing the accused. He further stated that except this, he had no money transaction with the accused. When the accused told him that he murdered a person, he informed the Police on phone at about 11.30 a.m. but the Police did not come and he also did not take it seriously.

10. We are not at all impressed by this witness Gordhanji Gigaji. He seems to be a got up witness. He

came to know the accused just two months of the incident. Admittedly, earlier there was no money transaction between him and the accused, therefore, there was no question of accused going to meet and asking Rs.200/- from him for going to Ahmedabad. If he had really informed the Police on telephone, then such entry would have been there in the Police Station. He is MLA and responsible person, therefore, he could not have taken the matter casually when the Police did not come in spite of his telephonic message about such serious offence. In view of this, we are not prepared to rely on his evidence. In our considered opinion, the learned Trial Judge has committed an error in relying upon his evidence on the ground that he is MLA and responsible person.

11. If that was the only evidence, without any hesitation, we would have set aside the order of conviction and sentence passed by the learned Trial Judge, but, in this case, there is evidence of as many as three eye witnesses. It is no doubt true that, all the three eye witnesses are the friends of deceased Mahesh, but only on this ground, their testimony cannot be discarded. At the same time, their evidence is required to be carefully scrutinised. From the evidence of the aforesaid three eye witnesses, it is clear that all the three witnesses were hiding the real story and they have not come before the court with the real version. The complaint for fault was lodged on the previous day of the evening at about 7.00 p.m. and the deceased had come to the place of incident with his two servants - Atul and Dilip on the next day morning at about 10'0 clock, therefore, obviously the accused would not be knowing that they were coming at a particular time. Ganpatji Kapurji Mali has clearly stated in his evidence that he had not told to Dharmendra, when he lodged the complaint about fault, that the accused had cut the wires. The deceased and his two servants had gone on the terrace of Vir Vijay Flats and after repairing the fault, they were coming down. They had already come down. They must have told Ganpatji Kapurji Mali that repairing work was done and his complaint was attended. Thereafter, all the four, Mahesh (deceased), Dilip, Atul and Ganpatji Kapurji Mali, must have come down and at that time they must have seen the accused. It is not possible for us to believe that on mere asking, why he was cutting wires, the accused would lose his temper and abuse him and by threatening to kill immediately, he would have taken out the knife and given blows. It is no doubt true that, all the witnesses have denied the suggestions put to them that they had scolded the accused and caught hold of him and tried to beat him and because of that the accused

took out a knife from his pocket and gave blows to deceased Mahesh. But the circumstances show that first there must be an altercation between the deceased Mahesh and accused, followed by scuffle. At that time, the accused must have taken out a knife, given blows to the deceased. Looking to the size of the knife, it appears to us that it was a small penknife, and the way in which the accused had given blows to the deceased Mahesh, shows that while trying to save him from the clutches of these four persons, he must have given the blow after blow. Thus, the case of the appellant accused falls under Exception 4 to Section 300 IPC.

It is no doubt true that all the four persons were unarmed, therefore, Ms. Sagar, learned Advocate for the appellant was not right in submitting that it is a case of self defence. Then it was submitted that it is the case of exceeding the right of self-defence. There is substance in this submission.

11. The next question is what offence is committed?

Ms. Sagar, learned counsel for the appellant - accused has submitted that it would be the case of Section 304 Part-II IPC as the accused had no intention. At the most, knowledge can be attributed to the accused. We are not prepared to accept this submission. It is no doubt true that, the accused was not aware that the deceased and others were coming to his flat for repairing the fault on that day. It is also true that prior to this incident there was no enmity between the deceased and accused. But, at the time of incident, the manner in which accused gave blow after blow with the knife to the deceased suggests that he had intention. In that view of the matter, the case of the appellant accused would fall under Section 304 Part-I IPC and not under section 304 Part-II.

12. The next question is what should be the sentence?

The jail record of the appellant - accused produced by the learned APP Shri Prachhak for the respondent State shows that presently the appellant accused is 39 years of old, he has remained as under trail prisoner for a period of two years and six months and after conviction order dated 16.12.96 he has remained in jail for a period of 7 years 1 month and 11 days. Thus, in all, he has remained in jail for a period of more than 9 years 1 month and few days. He was never released either on furlough or on temporary bail. He has earned remission of two years. His jail conduct is also reported to be good. In view of this, we are of the considered opinion that the sentence

as already undergone by the appellant accused would serve the ends of justice.

14. In view of the above discussion, the order of conviction for the offence under Section 506(2) of the IPC and sentence of RI for one year is maintained. Order of conviction under Section 135 of the Bombay Police Act and sentence of four months RI is maintained, but fine of Rs.100/- imposed by the learned Additional Judge for said offence under Section 135 of the Bombay Police Act is hereby quashed and set aside. The order of conviction passed by the learned Additional Sessions Judge convicting the appellant accused for the major offence under Section 302 IPC and sentencing him to suffer life imprisonment and to pay fine of Rs. 200/- in default to further undergo one year RI is hereby quashed and set aside. Fine if paid, be refunded to the appellant - accused. However, the appellant accused is found guilty for the lesser offence under Section 304 Part-I IPC and he is sentenced for the imprisonment which he has already undergone. Accordingly appeal is partly allowed. Appellant accused be released forthwith from jail if he is not required in connection with any other case.

(B.J.Shethna, J.)

(J.R. Vora, J.)

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